No. 629

FILED

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CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1941

DORA BRADY and LUCINDA WATASHE,
Petitioners,

vs.

ANNIE BEARDS; MELVINEY BARNETT DITTLER; THE ESTATE OF NELLIE BARNETT, Deceased; ESTATE OF JIMMIE BARNETT; MAHALEY FISH HICKMAN; WINEY FISH LEWIS; KATIE FISH LITZEY; FRAZIER FISH; MILLIE FISH GILROY; CHARITY BUCKLEY SMITH; WILLIAM FISHER; FRANCIS SUTTON, nee FISHER; MARIAN STEPHENS; LAURENCE H. FISHER; MARIAN FISHER TOMPKINS; LEWIS FISHER; ROSA FISHER; SUSIE CONNER; Heirs of Emma Burgess, Husband, For Himself and as Next Friend of His Minor Children; WILLIAM BURGESS, LITTLE JOHN BURGESS, SISSIE BURGESS, NOAH BURGESS, and JOE BURGESS; MAY (PLANTAH) CONNER; WYNIE CONNER HERRICK; REBECCA J. BAKER; KATIE WILLIAMS, nee KNIGHT; Heirs of Lou Williams, Deceased; M. L. WILLIAMS; JOHN F. DAVIS; LUCY KNIGHT; EMMA BEAR; ANNIE COBAR, nee CONNER; NETTIE BEAR, nee CONNER; WILLIE CONNER; JOHN CONNER; CHEROKEE STEPHEN; BARNEY STEPHEN; EMMA GOOCH; IDA GOOCH; and ELSIE GOOCH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT TO REVIEW A JUDGMENT AFFIRMING THE JUDGMENT OF THE UNITED STATES COURT FOR THE EASTERN DISTRICT OF OKLAHOMA AND SUPPORTING BRIEF

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Attorney for Petitioners.

December, 1941

INDEX TO PETITION FOR WRIT OF CERTIORARI

Page

(All emphases are petitioners' unless otherwise stated. The transcript of record in the trial court comprises 3 parts, the Reporter's Transcript, referred to as "Rep. Tr."; the Clerk's Transcript referred to as "Clk's Tr."; and the Exhibits of the different parties, referred to by number or letter. An Appendix is filed herewith, consisting of two volumes. Volume I comprises the Briefs and Petition for Rehearing of Petitioners, as appellants, and Volume II contains the Answer Brief of Respondents, as appellees, in the Circuit Court of Appeals. The Transcript of the Record of Proceedings in the trial court contains approximately 8,000 pages of purely incompetent, irrelevant and immaterial evidence, and only about 3,000 pages of competent and material evidence and proceedings, and only about 500 pages of same, scattered through the mass of incompetent and irrelevant evidence, relate to the case of petitioners. The length and detail of the Petition and Brief herein results from assembling and presenting all of the evidence and proceedings which are material to the case of petitioners to the end that the Court may not be required to examine said voluminous record.)

1. Statement of Case 1- 9

Petitioners and Respondents Herein are Interveners 1- 2

The United States Interpled on Behalf of Petitioners and Respondents and Other Restricted Indian Interveners 2- 4

The Assistant United States Attorney, Representing the United States as such interpleader on behalf of Petitioners and others, improperly Acts and Co-

(32582

Page

operates with Attorneys for Respondents in Negotiating, Executing, and Carrying Out a Purported Agreement and Family Settlement and Secures Approval of same by Trial Judge Against Petitioners 5- 9

ers 5- 9

2. Only One Controlling Issue of Fact Was Presented and as to Said Issue There Was No Conflict in the Evidence 10- 19

Statement of Counsel for Respondents as to said Sole Issue 10

Digest of Evidence on behalf of Petitioners and Respondents by Periods of the Lives of Jackson Barnett and his Son, Albert (Barnett) Brady, the Father of Petitioners, Disclosing said Absence of Conflict;

As to Jackson Barnett:

Period of Life of said Jackson Barnett from 1852, Approximate date of his Birth until 1865, When about 12 years of Age 10- 11

Same for Period 1865-1872, While said Jackson Barnett Lived at the Home of Billy (William) McCombs 11- 12

Same for Period from 1872 to 1875, Age 20-23, When Jackson Barnett Lived at and in the Vicinity of the Home of Judge Colbert, and Albert Barnett, Afterwards Known as Albert Brady, the Son of said Jackson Barnett and Cinda Colbert was Born 12- 13

Same From 1875 to 1891, Age 23-39 Years, When said Jackson Barnett Lived at or in the Vicinity of John Leecher (Leecher's Ferry).. 13

Page

Same for Period From 1891 to 1934 (Age 39 to 82 Years), During which He Stayed from Place to Place in Senora, later Bryant, Siah Barnett Neighborhood, until Taken to California Where he Died 13- 14

As to Albert Brady:

Period of Life of Albert (Barnett) Brady, date of Birth, to 1876 When Jackson Barnett and Cinda, His Parents, separated 14- 15

Same for Period From 1876 to 1895, Age Approximately 1 to 20 years, When Albert Brady Lived with His Mother's Relatives 15

Same for Period From 1895 to 1897, Age Approximately 21 to 23 Years when He Lived with Alice Fox, and Lucinda Watashe, Formerly Brady, a Daughter, was Born to Them 16

Same for Period From 1898 to June, 1922, Date of Death of Albert Brady, Age 23 to 48 Years, During which He Married and Lived with Mary Fisk, and Petitioner, Dora Brady, was Born, and Albert Brady Visited and was Visited by said Jackson Barnett, his Father 16- 18

3. The Filing of Petition and Affidavit to Disqualify the Trial Judge, and Amendments Thereto, and the Erroneous Proceedings in the Denial of Same ..18- 22

First Knowledge or Information of Petitioners and Counsel of Participation of Trial Judge in Negotiation, Approval and Carrying Out of Agreement or So-called Family Settlement Received Only 2 Days before said Petition and Affidavit to Disqualify was Filed 18- 20

Page

Petition and Affidavit to Disqualify set forth Verbatim the Record of the Acts, Doings, Charges and Threats of said Trial Judge 20- 21

Trial Judge Directed Counsel for Respondents to File Motion to Strike said Petition and Affidavit to Disqualify 21

The Trial Judge Caused the Truth of said Record Facts Set Forth in said Petition and Affidavit to Disqualify to be put in Issue and Admitted Oral and Documentary Evidence on Hearing Thereof and Found and Concluded that said Record Facts therein Stated Were Not True, and that said Petition and Affidavit to Disqualify were not Filed in Good Faith 20- 22

4. Findings of Fact of Trial Court Contrary to and in the Face of the Uncontradicted Evidence 22- 31

5. Two Purported Conclusions of Law—One Based on Erroneous Unsupported Findings of Fact, and the Other, Irrelevant as Well as Unsupported 31- 32

6. Judgment of the Trial Court 32

7. Appeal from the Judgment of the Circuit Court of Appeals 33

8. Basis of Jurisdiction of Supreme Court to Review Judgment 33- 34

9. Questions presented and Reasons for Allowance of Writ of Certiorari Nos. 1 to 15, Which Specifically Appear in Index to Supporting Brief 34- 35

INDEX TO BRIEF OF PETITIONERS

Page

Statement of Record, Points Presented, Absence of Issue of Fact, and Appendix Hereto 47- 48

Point One: Agreement among respondents, negotiated, executed and carried out through acts, and coöperation of Assistant United States Attorney, the trial judge, officers and representatives of the Departments of the Interior and Justice, and counsel for the respondents, wrongfully employed to secure and did secure the active support and influence of all of said officers in securing the judgment in favor of respondents and against petitioners herein was improper and against public policy 48- 51

Point Two: Having interpled herein on behalf of the United States as the guardian of petitioners and other restricted Indian parties, the said United States Attorney was without authority or right to participate in negotiating, and assisting in carrying out the said agreement, and securing the approval of same by the trial judge, and other federal officers, and thereafter representing said respondents against petitioners and preparing and presenting to and securing the approval by said judge of findings of fact and conclusions of law consummating the said agreement through a judgment in favor of respondents and against petitioners, and said trial judge was disqualified to determine the issues between petitioners and respondents herein.51- 54

Points Three and Four: On account of said above participation in the execution, approval and carrying out of said agreement, the said trial judge became personally biased and prejudiced against petitioners as is clearly evidenced by subsequent repeated, unpro-

Page

voked, unquestioned, hostile, oppressive, threatening acts and charges against petitioners, petitioners' counsel and witnesses during the purported hearing herein; that said actions on the part of the trial judge were fully set forth in a petition and affidavit to disqualify said trial judge duly and timely filed herein; that said trial judge on account of the above was disqualified to hear, try and determine the issues and render a judgment herein, and that the Circuit Court of Appeals erred in overlooking the above and according to the said proceedings and judgment the presumption, weight and consideration due such proceedings by a qualified judge 54- 111

Unquestioned facts set forth in said petition and affidavit to disqualify trial judge showing personal bias and prejudice:

In Examination of Wade Kilcrease 56- 60

In Examination of Robert Kelley 60- 69

In Examination of Thompson Colbert 69- 75

In Examination of Dora Brady 75- 79

In Examination of Sim L. Liles 79- 83

In Examination of Mary Davis 83- 89

In Examination of Hugh Hale 89- 90

In Examination of Lucille Hiatt 90- 93

In Examination of R. C. Mason 93- 96

In Examination of Alice Fox 96- 102

Point Five: The trial judge exceeded jurisdiction in requiring counsel for respondents to put truth of facts stated in petition and affidavit to disqualify and good faith of petitioners in filing same in issue, and admit-

Page

ting evidence on said issues and finding and concluding that said stated facts were untrue and that said petition and affidavit were not filed in good faith, and the Circuit Court of Appeals erred in overlooking said erroneous proceedings, and the lack of jurisdiction of the trial court therein and in according said proceedings, findings, conclusions, and judgment the presumption and weight of those of a qualified judge 112- 122

Point Six: That it is obvious from an examination of the petition and affidavit to disqualify that the facts as to the said actions and charges of the trial judge which are set forth verbatim and in full therein, and that the same are not stated in the form of conclusions and were duly and timely filed 122- 123

Point Seven: That the trial judge and the Circuit Court of Appeals overlooked and failed to apply to petitioners' cause the well-recognized rule that the findings and statements in the enrollment record of a Creek Indian as to the identity of the parents of said enrollee are presumed to be true unless overthrown by strong, clear, cogent and convincing proof 123

Point Eight: The Circuit Court of Appeals overlooked the rule that only endorsements on the census card of enrollees which relate to the identity of the enrollee are admissible in evidence 124

Point Nine: The trial judge in finding and concluding that there was no evidence that Jackson Barnett and Cinda Colbert, the parents of Albert (Barnett) Brady, were married, and likewise finding the same as to Albert Brady and Alice Fox, the parents of petitioner, Lucinda Watashe, overlooked the presumption under

Page

controlling decisions that said offsprings were legitimate where the enrollment record stated the identity of the parents 124- 125

Point Ten: Under the proceedings and judgment herein it is clear that this court has jurisdiction to review same by writ of certiorari 126-130

Point Eleven: The trial judge overlooked, ignored or disregarded all the evidence on the part of all the parties, and the admissions, and stipulations in making findings of fact herein, and the Circuit Court of Appeals overlooked and did not refer to, discuss or decide the Point 130- 141

Point Twelve: The finding that Jackson Barnett was an incompetent, and without sufficient mental capacity to enter into a valid marriage contract is contrary to the evidence 142

Point Thirteen: The legitimacy of Albert Brady and petitioners on account of lack of evidence of marriage of parents or grandparents may not be attacked herein 142- 143

Point Fourteen: Findings of fact indicate personal bias and prejudice against petitioners 143- 145

AUTHORITIES CITED

Atwater v. Sellers, 239 N. W. (Neb.) 629 49

Barnett v. Equitable Trust Co., 121 Fed. (2d) 375.... 111

Berger v. United States, 255 U. S. 35, 41 S. Ct. 230, 65 L. ed. 481 .....119, 120, 127

Brown v. First National Bank, 27 N. E. (Md.) 158.... 49

Page

Carter Oil Co. v. Scott, 12 Fed. (2d) 780 125
Chetwood, In re, 165 U. S. 443, 17 Sup. Ct. 385 126
Church Street Bldg. Corp., In re, 299 U. S. 24, 57 S. Ct. 88 127
Cox v. Colbert, 35 Okla. 218, 275 Pac. 317 125

Dodson v. McCarnin, 160 N. W. (Iowa) 927 49

Eggleston v. Pantages, 175 Pac. (Wash.) 34 49

Gray v. McReynolds, 21 N. W. (Iowa) 777 49
Gugloz v. Gehrkins, 130 Pac. (Cal.) 8 49

Haskell v. Beartail, 107 Okla. 103, 227 Pac. 392..... 125
Hegler v. Faulkner, 153 U. S. 109, 14 S. Ct. 779, 38 L. ed. 463 125
Hughes v. Kano, 60 Okla. 202, 173 Pac. 447 143
Hunt v. Hunt et al., 23 Okla. 490, 100 Pac. 54 143

Lazenby v. Lazenby, 65 S. E. (Ga.) 120 49
Lewis v. United States, 14 Fed. (2d) (8th Cir.) 369.. 119
Locust v. Caruthers, 22 Okla. 373, 100 Pac. 520..... 125

Malone v. Alderdice, 212 Fed. 668 125
McFarland v. Harned, 115 Okla. 291, 243 Pac. 14 125
McGugin v. United States, 109 Fed. (2d) (10th Cir.) 94 111
Morris v. United States, 26 Fed. (2d) (8th Cir.) 444 113
Mott v. United States, 283 U. S. 747, 51 S. Ct. 642, 75 L. ed. 1385 111
Mowdy v. Leeper, 122 Okla. 16, 250 Pac. 432 125

Nation v. United States, 14 Fed. (2d) (8th Cir.) 507.. 120

Page v. Atkins, 86 Okla. 290, 209 Pac. 807 125
Palmer v. Replogle, 152 Okla. 140, 4 Pac. (2d) 30 125

Quercia v. United States, 289 U. S. 466, 53 Sup. Ct. 698 127

Ridenbaugh v. Young, 46 S. W. (Mo.) 956 49
Ross v. Ross, 175 Okla. 633, 54 Pac. (2d) 611 143

Page

Shields v. United States, 273 U. S. 583, 47 S. Ct. 438 .. 126

Turner v. United States, 14 Fed. (2d) (8th Cir.) 360 128

United States v. Beatty, 232 U. S. 463, 467, 34 S. Ct. 392, 58 L. ed. 686 128

United States v. Mott, 37 Fed. (2d) 860 111

United States v. Wildcat, 244 U. S. 111, 61 L. ed. 1024, 37 S. Ct. 561 125

Yaholar v. Autry, 156 Okla. 257, 10 Pac. (2d) 676 125

TEXT AND REFERENCE BOOKS

17 C. J. S. Contracts, Sec. 223, page 594 49

33 C. J., Sec. 20, page 438, Sec. 47, page 459 53

33 C. J., Sec. 180, page 1014 117

Hughes Federal Practice, V. 8, Sec. 6283, page 533 128

6 R. C. L. Contracts, Secs. 157-158, page 751 49

15 R. C. L. 226 53

STATUTES

Section 25, U. S. C. A., Sec. 21 Judicial Code 112

Section 240, Judicial Code, Sec. 347, U. S. C. A., tit. 28 127

Section 262, Judicial Code, 28 U. S. C. A., Sec. 377.... 127

Section 677, O. S. 1931 143

NO. .....

In the Supreme Court of the United States

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DORA BRADY and LUCINDA WATASHE,
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VERSUS

ANNIE BEAMS; MELVINEY BARNETT DITZLER; THE ESTATE OF NELLIE BARNETT, Deceased; ESTATE OF JIMMIE BARNETT; MAHALEY FISH HICKMAN; WINEY FISH LEWIS; KATIE FISH LITZEY; FRAZIER FISH; MILLIE FISH GILROY; CHARITY BUCKLEY SMITH; WILLIAM FISHER; FRANCIS SUTTON, *nee* FISHER; MARIAN STEPHENS; LAURENCE H. FISHER; MARIAH FISHER TOMPKINS; LEWIS FISHER; ROSA FISHER; SUSIE CONNER; Heirs of Emma Burgess, Husband, For Himself and as Next Friend of His Minor Children: WILLIAM BURGESS, LITTLE JOHN BURGESS, SISSIE BURGESS, NOAH BURGESS, and JOE BURGESS; MAY (HANNAH) CONNER; WYNIE CONNER HENDRIX; REBECCA J. BAKER; KATIE WILLIAMS, *nee* KNIGHT; Heirs of Lois Williams, Deceased; M. L. WILLIAMS; JOHN F. DAVIS; LUCY KNIGHT; EMMA BEAR; ABBIE COSAR, *nee* CONNER; NETTIE BEAR, *nee* CONNER; WILLIE CONNER; JOHN CONNER; CHISSIE STEPNEY, BARNEY STEPNEY; RHODA GOUGE; IDA GOUGE; and ELIZA GOUGE,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT TO REVIEW A JUDGMENT AFFIRMING THE JUDGMENT OF THE UNITED STATES COURT FOR THE EASTERN DISTRICT OF OKLAHOMA AND SUPPORTING BRIEF

Come now the petitioners, Dora Brady and Lucinda Watashe, duly enrolled restricted Creek Indians, and state

that petitioners *and respondents* are interveners in the consolidated action herein involved in which the numerous parties seek the determination of the heirs to and the distribution of the restricted estate of Jackson Barnett, a deceased duly enrolled fullblooded Creek Indian *and in which a judgment has been heretofore rendered in favor of the respondents and against these petitioners, and an appeal had therefrom to the Circuit Court of Appeals and said judgment erroneously affirmed and the review of which judgment is herein sought.* Two of the three actions herein consolidated were filed in the County and District Courts of Muskogee County, and the third in the District Court of McIntosh County, Oklahoma, seeking the appointment of an administrator for the said estate, the determination of the heirs and the distribution of the property of the said estate. Notices of the filing of the said actions in the said State Courts were served on the United States Attorney for the Eastern District of Oklahoma, and upon the application of the said United States Attorney, said actions were duly transferred and removed from said State Court to the United States Court for the Eastern District of Oklahoma, wherein said actions were consolidated and entitled and numbered—*In the Matter of the Estate of Jackson Barnett, Deceased,* No. 4556 Equity.

That said United States Attorney, through his assistant, Charles W. Miller, representing the United States, duly filed in the said consolidated action on behalf of the United States, its interpleader on behalf of and as guardian of all the restricted Indian heirs of Jackson Barnett, deceased,

among which were these petitioners, Dora Brady and Lucinda Watashe. Said petition recited the material facts as to Jackson Barnett and his estate and the status of this proceeding and all the then parties and interveners herein and further stated that other persons were claiming to be the heirs of said Jackson Barnett, and that the United States as **"intervener files this, its petition of intervention herein as guardian of its restricted wards, who may by this court be adjudged to be the heirs at law of the estate of the said Jackson Barnett."** (Pp. 81, 82, Vol. 1, Cl. Tr.) The said attorney filed herein an amended and supplemental petition of intervention of the United States of America, wherein the allegations of the prior petitions were plead and in addition thereto the plea of *res judicata* alleged against any and all claims of Anna Laura Lowe, who was not a restricted Indian, based upon final judgments and decrees theretofore rendered in Federal Courts of competent jurisdiction. The said intervention petitions prayed **"that the court determine who are the true and lawful heirs of said Jackson Barnett, deceased, and distribute said estate to the rightful heirs as their respective interests may appear; that the claimants who are restricted Indians may have the protection to which they are entitled; that the United States of America be protected by final decree in its rights and duties with respect to said restricted Indians and their restricted property."** (P. 342, Vol. 1, Cl. Tr.) That in addition to the original parties to said original actions so consolidated numerous parties, including these petitioners, were permitted to file interventions and to be made parties.

The court permitted the United States to so interplead. Thereafter on June 30, 1936, three certain groups of claimants to heirship to the said estate, being the respondents herein (referred to as the Fisher, Connor and Gough groups) entered into a purported **"Contract and Family Settlement," among themselves and against all other claimants to heirship herein, and in which, among other things, it is stated and agreed** "that other claimants in the suit were related so remotely to said decedent as not to be entitled to inherit from him," and that "the parties hereto are unable to forecast with any degree of certainty which of the said parties hereto will be found and adjudged the next of kin to Jackson Barnett and entitled to prevail over the others," and "that it will be to their best interest for them to unite in their efforts to contest and defeat each of said other claimants, and not to oppose each other, and that in so doing they will not only protect their own legitimate interest, but will also promote the ends of justice and facilitate an early conclusion of this litigation," and to share all future expenditures in the prosecution of their said claims. (Pp. 481, 492, Vol. 1, Cl. Tr.)

That the attorneys of the said groups, respondents herein, deeming it desirable to secure the aid of the said Assistant United States Attorney in negotiating and obtaining the approval of the said contract and agreement by the judge who at the time had been assigned to hear and determine said action, the Attorney General of the United States, the Solicitor for, and the Secretary of the Department of the Interior wrongfully induced said Assistant United States

Attorney, without notice to or the knowledge of petitioners to so act and to then contact the said judge and other named federal officers in behalf of said respondents, and against the legal rights of these petitioners, and to secure the approval by the said judicial and administrative officers of the said "contract and agreement" to the end that the success of respondents in this action could not fail of consummation.

That the Assistant United States Attorney, so appearing for the United States, as interpleader on behalf of all restricted Indian Claimants, including these petitioners, secretly, wrongfully, improperly and collusively so abandoned his neutral position in October, 1936, five months before this action was called for trial, and purporting to represent the United States, as such interpleader, after contacting and securing *the concurrence of the said judge,* Honorable ROBERT L. WILLIAMS, actively assumed the lead in inducing the Attorney General and the Secretary of the Interior Department of the United States to approve and carry out the said compromise agreement or family settlement as is evidenced by letter written by the said Assistant United States Attorney to said Attorney General on October 13, 1936, as follows:

> "• • • During the past eighteen months some 6,000 pages of depositions have been taken. [No depositions had been taken by these petitioners and no depositions had been taken in opposition to the claim of these petitioners.] From the information adduced in these depositions and from other information available to me, I am of the opinion that the three groups named in the con-

tract are the proper heirs of Jackson Barnett and should inherit his estate. It appears that Siah Barnett was the father of Jackson Barnett, and his descendants are represented by Group No. 1. [Part of these respondents.] There is no question as to who was the mother of Jackson Barnett, she was Thlesothle. Groups No. 2 and No. 3 [the remainder of the respondents] are composed of the descendants of Thlesothle and are referred to as the maternal claimants. There is a controversy among some of these claimants as to which ones are the nearest of kin of Jackson Barnett, but as descendants of the mother it seems to me that it would be only equitable and just that they should all come in and share, regardless of whether they are cousins or nephews.

"Again, there is a contention between groups 2 and 3 on the one hand, and group No. 1 on the other, as to the legitimacy of Jackson Barnett and as to the validity of the marriage between Siah Barnett and Thlesothle. The evidence shows [depositions on behalf of said group No. 1 in which these petitioners were not concerned] that Siah Barnett took Jackson Barnett into his home and recognized him as a child, and these claimants are the descendants of Siah Barnett and they should not be cut out by the legal technicality of the validity of a marriage nearly a hundred years ago in this unsettled country. It seems to me that it is good policy to divide this large estate among as many full-blood Indians as possible, provided, of course, they are blood kin of Jackson Barnett and entitled to inherit.

"Thus far in the conduct of this case I have taken no positive stand for or against any individual claimants. *I have taken the position that the Government is a stakeholder and ready to pay out the money to those whom the court may find to be entitled thereto.* It was my desire to have the case develop from step to step, to

give every claimant a full and free opportunity to present the evidence in support of his claim, and to see that justice was done. [The case had not been set for trial and no evidence had been presented. This letter was written October 13, 1936, and the trial of this cause began on March 22, 1937. Why the hurry of taking this secret action more than five months before the trial opened?] *This largely because, at the inception of the case, I did not know and no one knew who were the heirs of Jackson Barnett.* However, the case had advanced to the point where I believe this office would be justified and that it is my duty to take the position that the groups mentioned in this agreement are the proper heirs of Jackson Barnett. With this in view, it is my opinion that the approval of this agreement not only would not embarrass the United States, but would materially assist in properly presenting the claims of these full-blood Indians." (Pp. 499, 500, V. 1, Cl. Tr.)

That the then Attorney General of the United States was in that manner induced by the said Assistant United States Attorney to lend his approval and aid in the execution and consummation of the said contract is evidenced by the following quotation from an opinion prepared for the Secretary of the Interior, dated December 14, 1936:

"It has been suggested that the contract may be against public policy, but it is not entirely clear that this is true. **The United States Attorney in charge of the litigation has stated his approval of the contracts and has also discussed the matter with the United States District Judge. The latter (the trial judge) has indicated his view that the contract probably would not be against public policy. Considering all of the circumstances, and since the arrangement proposed is not a secret one and is subject to approval by several courts,**

it would appear that you are under no compulsion to withhold your approval of said agreement because of a mere doubt. The parties are entitled to a presumption of legality and ought to be accorded their day in court upon this issue, if raised by any interested party." (Pp. 498-499, V. 1, Cl. Tr.)

From the above-quoted statement of the Attorney General his belief was that the said Contract and Family Settlement was not a secret one, and that the claimants, who were not parties thereto, could protect themselves against prejudice and compelling influence resulting from the consummation of the agreed plan. This belief on the part of the Attorney General that the actions so taken and the part so played by the Superintendent of the Five Civilized Tribes, the Assistant United States Attorney, the Trial Judge, the Attorney General, the Solicitor and the Secretary of the Interior, all representing the United States, interpleader herein on behalf of all restricted Indian claimants, was not secret and was known to all other claimants, and that such claimants could protect their interests against such combined influence, was erroneous as to the petitioners, Dora Brady *et al.*, and their attorneys. That the record shows and the facts are not denied that the petitioners had no knowledge of said acts and doings on the part of the said Assistant United States Attorney, the Trial Judge, and the administrative officers of the United States Government until June 16, 1938, approximately three months after petitioners had presented their evidence herein, but before the presentation of evidence on part of claimants was concluded herein. (Pp. 512-546, V. 1, Cl. Tr.)

ONLY ONE CONTROLLING ISSUE OF FACT INVOLVED

That at all times it was understood and accepted by and between the petitioners and the respondents that the controlling question or issue of fact was as to whether or not the Jackson Barnett, who was the father of Albert Brady (Barnett), and the grandfather of petitioners, was the Jackson Barnett whose heirs are being determined in this action. That this is true is evidenced by the fact that on page 156, Volume II, appellees' (respondents here) answer brief in the Circuit Court of Appeals herein states the sole issue of fact as follows:

> "The sole question presented by this appeal is: Was the Jackson Barnett whose name appears on the final enrollment records of the Creek Nation as the father of Albert Brady, the same person as the Jackson Barnett whose heirs are to be determined in this litigation."

That the evidence on the part of the petitioners, Dora Brady *et al.*, and the respondents, Annie Beams *et al.*, and on the part of all the other parties to this action, except the Kentucky and Tennessee claimants, which evidence is hereinafter digested, without material conflict, establishes the fact that the Jackson Barnett whose heirs are being herein determined was the Jackson Barnett who was the father of Albert Brady, and the grandfather of these petitioners.

STATEMENT OF PROCEEDINGS, MATERIAL FACTS, AND SUPPORTING EVIDENCE

That on the 16th day of March, 1938, the petitioners, Dora Brady and Lucinda Watashe began, and on the next day concluded, the presentation of evidence in the trial court in support of the allegations of their intervention herein that petitioners were the daughters of Albert (Barnett) Brady, deceased, who was the son of Jackson Barnett, deceased, whose heirs are being determined in this consolidated action, and Sinda Colbert, who married and lived together according to Creek Indian custom from approximately 1873 to 1875, and that petitioners are the sole heirs of the estate of Jackson Barnett and entitled to take and have distributed to them as such heirs the property of said estate. That said evidence appears in Volumes 10 and 11, pp. 4715 to 5000; Vol. 11, pp. 5001 to 5008, Reporter's Transcript herein, and is not contradicted as to any material fact. That the evidence on the part of the respondents in no material particular conflicts with the said evidence on the part of these petitioners, and in only one immaterial particular is there any conflict in the evidence, as will appear in the brief in support of this petition. That the substance of the unchallenged evidence in the Record, stated by periods in the life of said Jackson Barnett and Albert (Barnett) Brady, is in substance as follows:

1. That said Jackson Barnett, the decedent, admittedly enrolled as a fullblood Creek Indian, Tuckabatchee Town, No. 4524, Creek Census Card No. 1419, was born in approximately 1852 in the Creek Nation in the vicinity of Old Tuckabatchee, sometimes referred to

in the evidence as Buzzard Hill, Shell Creek, the Court House of the Creek Eufaula District, Tuskegee Baptist Church, just north of the South Canadian River, near the present town of Hanna; all some 6 to 10 miles west of the present location of the town of Eufaula, Oklahoma; and lived with his mother, Thle-so-thle, in that locality until approximately 1861, beginning or first part of the Civil War; that upon her death, Jackson Barnett was left in the keeping of his Aunt Jennie and Uncle Jeffry, and they subsequently left him at the home of Wm. (Billy) McCombs.

Wm. Fisher's Ex. 1: (Census card) States Jackson Barnett was born in 1852. V. 3, Reporter's Transcript, P. 1255, V. 6, Pp. 2677, 2705, 2809; V. 4, Pp. 1587 to 1590.

The above unchallenged statements of fact are established by the evidence in the record as follows:

Reporter's Transcript

Vol. 3, 1328-1329, 1330, 1334, 1355, 1445, 1456, 1462, 1464, 1477, 1468; Vol. 4, 1541, 1544, 1546; Vol. 5, 2137-2138; Vol. 6, 1836, 2842, 2844, 2845; Vol. 8, 3693, 3708, 3709, 3768, 3791, 3827, 3828, 3837, 3838, 3840, 3847, 3849, 3887-3888; Vol. 11, 5048-5049, 5050, 5337-5338, 5048-5049; Vol. 19, 9227, 9236, 9229-9230; Vol. 25, 13268, 13235, 13236.

PERIOD APPROXIMATELY 1865-1872
(Jackson Barnett's age 13 to 20 years.)

2. Shortly after the close of the Civil War, said Jackson Barnett was left at the home of William (Billy) McCombs, in the Creek Nation about three miles northeast of Old Tuckabatchee and one mile west of Tuskegee Baptist

Church, and lived there until about 1872, and was an average full-blooded Creek Indian boy in the matter of intelligence and habits.

See Reporter's Transcript as follows: Vol. 4, pp. 1529, 1539; Vol. 6, 2669, 2670, 2723, 2725, 2726, 2734, 2739; Vol. 8, 3887, 3888, 3899, 3827, 3828, 3850, 3851; Vol. 10, 5715, 2719, 4722, 4728, 4735, 4736, 4737, 4744, 4745, 4746, 4749, 4757, 4760, 4955, 4956, 4958; Vol. 11, 5337, 5339, 5340, 5341, 5342, 5346, 5351, 5014, 5015, 5020, 5126, 5070, 5095-5097; Vol. 16, 7816, 7827; Vol. 17, 8218, 8214, 8197, 8198, 8200-8202, 8323; Vol. 19, 9259; Vol. 21, 10044, 10045; Vol. 25, 13268-13269, 13206, 13213, 13237, 13218, 13219.

PERIOD APPROXIMATELY 1872-1875
(Jackson Barnett, age 20 to 23 years.)

3. Commencing in approximately 1872 and continuing until approximately 1875, Jackson Barnett lived at the home of Chowee, or Joe Colbert, a full-blooded Creek Indian, at one time Creek District Judge, who lived in the vicinity of old Tuskegee Church, and near the Tuskegee Courthouse, and about one mile from the home of William (Billy) McCombs. In addition to Jackson Barnett, several young Creek Indians of both sexes lived at said home, among them being Sinda Colbert, a niece of said Joe Colbert. In about the year 1872 or 1873, Jackson Barnett and Sinda began living and cohabiting together at said home and elsewhere, and a son, who was named Albert (afterwards Albert Sewell, and finally Albert Brady, the father of Lucinda Watashe, formerly Brady and Dora Brady, petitioners herein) was born to them. Jackson Barnett and Sinda recognized each other as being husband and wife and were so recognized by the family and others, and said

son was accepted and recognized by all as being the son of Jackson Barnett and Sinda.

Reporter's Transcript: Vol. 6, 2723, 2725-2726, 2734, 2739; Vol. 8, 3915; Vol. 10, 4715-4718, 4720, 4721, 4722, 4724, 4726, 4727, 4731 to 4736, 4746, 4747, 4749, 4750, 4751 to 4754, 4764-4766, 4767 to 4769, 4771, 4773 to 4778, 4955, 4956; Vol. 11, pp. 5078, 5095 to 5097.

PERIOD APPROXIMATELY 1875-1891
(Jackson Barnett, age 23 to 82 years.)

4. Jackson Barnett, in approximately 1875, after leaving Chowe or Joe Colbert's home, stayed at least a part of the time at Leecher's Ferry and worked at the said ferry on the Arkansas River, near Muskogee, Indian Territory, until approximately 1891, and thereafter lived for some years in the vicinity of Okmulgee and Henryetta, Oklahoma.

5. That Jackson Barnett, after leaving Leecher's Ferry, vicinity of Muskogee, Oklahoma, became a wandering Indian and what is commonly known as a "Snake Indian," and referred to as "Crazy Jackson," staying from time to time at the homes of Siah Barnett, Josh Asbury, Josiah Looney and others, and finally living alone in a log cabin, all in the vicinity of Senora, later Bryant, in the Hickory Ground area of the Creek Nation, until approximately 1912.

Likewise, all the evidence is to the effect that in about 1912, oil was first produced on the otherwise practically worthess arbitrary allotment which was made to the said Jackson Barnett, and thereafter his estate, and largely his personal control, was taken over by guardians and other persons seeking to profit through his wealth.

His guardian built him a house on part of his land and provided him an attendant. Jackson Barnett remained in said home until he was removed and taken from place to place about the country, largely dispoiled of his wealth, until he finally died in California on May 29, 1934. **One of the consolidated proceedings at bar was filed by members of the three successful groups, respondents herein, in an Oklahoma State Court on the second day, May 31, 1934, after the said death of Jackson Barnett in California, which evidences the fact that due preparation so to do was made in advance.**

Reporter's Transcript: Vol. 1, pp. 20, 28-29, 40-44, 71, 95, 208, 210, 213, 216, 220, 224, 225, 232, 234, 235, 239, 279, 344, 346-348, 350, 351, 353, 354; Vol. 4, pp. 1934-1940; Vol. 5, pp. 2479, 2487; Vol. 6, pp. 2503, 2506, 2510, 2512, 2516, 2523, 2566, 2567, 2568, 2571, 2589, 2595; Vol. 8, pp. 3918, 3919, 3924, 3925, 3923; Vol. 9, pp. 4385, 4392, 4393; Vol. 17, 2131-8132, 8321-8322; Vol. 22, p. 10619.

IN RE: ALBERT BRADY (BARNETT)
(Period Approximately 1874 to 1876.)

6. Albert Brady, enrolled fullblood Creek Indian, No. 5475, a member of Hickory Ground Creek Town, and Deer Clan, taking the town and clan of his mother, Sinda, was the father of appellants, Lucinda Watashe and Dora Brady, was born in about 1874, at or near the home of Chowee or Joe Colbert, the uncle of Sinda, the mother of said Albert Brady. Jackson Barnett and Sinda were the parents of said Albert Brady (Brady Exhibit Nos. 5 and 6) and said parents lived at or near said Colbert's home until said Albert was from 1 to 2 years of age, when Jackson Barnett left and went to Cain Creek on the Arkansas River, location of Leecher's Ferry, and Sinda then took Albert to the home of her brother.

Brady's Exhibit No. 7, being affidavit for marriage license, dated February 17, 1898, stating Brady's age at 23, and that *Jackson Barnett and Lucinda (Sinda) Colbert, were his parents.*

Fisher's Exhibit No. 20 states age in 1896 as 22 years and year of birth 1874 and *Sinda* to be mother and *Charley Barnett* to be the father of Albert Brady. *This error as to the name of father was corrected* later by the Dawes' Com., and stated to be *Jackson Barnett* in Brady's Exhibit No. 5.

Brady's Exhibit No. 5, Creek Census Card, age stated March 6, 1900, 24 years, and states mother to be *Sinda Sewell* ("Sewell," being name of second husband) and his father to be *Jackson Barnett.*

Reporter's Transcript: Vol. 10, pp. 4715 to 4720, 4722, 4724, 4726, 4728, 4730-4731, 4732 to 4736, 4737, 4744 to 4746, 4750-4752, 4757, 4758, 4760, 4762 to 4764, 4766, 4769, 4770 to 4773, 4775, 4866 to 4868.

IN RE: ALBERT BRADY (BARNETT)
(Period Approximately 1876 to 1895.)
(Age from 1 to 21 years.)

7. Albert Brady's mother, Sinda, after she and Jackson Barnett separated, married Parney Sewell, and the mother of Parney Sewell, Salley Mooney, was the wife of Andrew Brady, and Albert was raised in the family of said Andrew Brady and took the name of "Brady." Albert Brady was known and understood by the Sewell and Brady families as being the son of Jackson Barnett and Sinda.

Reporter's Transcript: Vol. 10, pp. 4778, 4779, 4780, 4781, 4782-4783.

IN RE: ALBERT BRADY (BARNETT)
(Period Approximately 1895 to 1897.)
(Age 21 to 23 years.)

8. Albert Brady lived with Alice Fox and Brady's Exhibit No. 10, being Census Card No. 503, Field No. 505, dated June 20, 1899, shows Alice Fox and Albert Brady to be the parents of Lucinda Brady now Watashe; that Albert Brady was a member of Hickory Ground Creek Town; that Alice Fox was a member of the Tuskegee Creek Town; that said Lucinda Watashe is No. 1641 on the Dawes Creek Roll and was three years of age in June, 1899.

Reporter's Transcript: Vol. 10, pp. 4995-4996, 4998-5003, 5004-5008.

IN RE: ALBERT BRADY (BARNETT)

(Period Approximately 1898 to June, 1922, Date of Death, 23 to 48 years of age.)

9. Albert Brady and Mary Fisk were married on February 28, 1898, and on September 17, 1899, Dora Brady, a daughter, was born to them, and on April 22, 1902, the enrollment of said Dora Brady as the daughter of said Albert Brady and Mary was approved by the Dawes Commission. In affidavit by Albert Brady for marriage license, dated February 17, 1898 (Brady's Ex. No. 7), said *Albert Brady states that the name of his father is Jackson Barnett, and the maiden name of his mother, Lucinda Colbert.*

Brady's Exhibit No. 5, being Census Card 1701 (Fisher's Exhibits 19 and 23) shows Albert Brady to be the father of Dora Brady, and that Jackson Barnett is the father of Albert Brady.

Albert Brady, in about 1900, took allotment for himself and daughter, Dora Brady, near Bristow, Okla-

homa, and lived thereon until his death in June, 1922. He, from time to time, visited and was visited by his father, Jackson Barnett, and he made the identity of his said father, Jackson Barnett, known to his friends and tenants. After 1912, when the said Jackson Barnett became wealthy on account of oil royalties from his arbitrary allotment, Jackson Barnett lost his freedom of movement on account of the supervision of his guardians and others who suddenly became interested in his affairs; however, Albert and Dora Brady did not lose interest in their said parent and grandparent, Jackson Barnett, as is fully shown by the evidence of their friends and neighbors with whom they conversed, and the trial court was not justified in his condemnation and finding (p. 714, V. 2, Cl. Tr.) that said Albert and Dora Brady failed to come to his relief and protect him from his guardians and federal agents as is shown by the evidence hereinafter recited.

Brady's Exhibit No. 5 (being same as Fisher's Exhibits Nos. 19 and 23) erroneously recites that Jackson Barnett, the father of Albert Brady, was a member of Hickory Ground Town. That this recital is erroneous is conclusively shown by the following:

Brady's Exhibit No. 8, being a certificate signed by A. G. McMillan, assistant superintendent of the Five Civilized Tribes, and which certifies:

"* * * that I have made a thorough and complete examination of each and everyone of the Creek Tribal Town Rolls of the Creek Nation of Hickory Ground Town for the years 1858, 1859, 1867, 1882, 1890 and 1895, and find that there is no person named Jackson Barnett enrolled thereon; that the above named rolls compose the whole and complete Creek Tribal Records, showing the enrollment of the members of Hickory Ground Town during the above mentioned preiods as

are on file in this office and compiled by the Creek Tribal Officials."

The above statement of facts is established by evidence in the record as follows:

Reporter's Transcript: Vol. 10, 4925, 4964-65, 4787 to 4799, 4800, 4801, 4807, 4812 to 4816, 4818, 4819, 4822 to 4824, 4826, 4827, 4838 to 4843, 4845 to 4848, 4857 to 4859, 4870, 4871, 4878 to 4882, 4884, 4890 to 4899, 4900, 4904 to 4906, 4908, 4909, 4915 to 4917, 4921, 4922, 4982, 4983, 4985, 4986, 4987, 4991 to 4995; Vol. 18, pp. 8651 to 8655.

THE FILING OF PETITION AND AFFIDAVIT TO DISQUALIFY THE TRIAL JUDGE, AND AMENDMENTS THERETO, AND THE ERRONEOUS PROCEEDINGS IN THE DENIAL OF SAME

That immediately following the said attempt to present evidence on behalf of these petitioners, the judge recessed the hearing until June 20, 1938. During said recess and on June 11, 1938, a copy of the said "contract" and "family settlement" and the correspondence between said Assistant United States Attorney and the officers of the Departments of Justice and Interior, and a statement of the acts and doings of said parties, including the trial judge, and counsel for the respondents in relation to the said "contract" and "family settlement" were filed in this cause in connection with and as exhibits to an affidavit of Lucy Curns *et al.* to disqualify said trial judge from proceeding further in the purported trial of this action.

That 5 days thereafter and on June 16, 1938, information as to said acts and doings of the said parties, first became

known to counsel of petitioners, and though said counsel to said petitioner, Dora Brady, on June 18, 1938, 2 days thereafter, and that the said information as to the said acts and doings of said United States Attorney, the trial judge, representatives of the Departments of Justice and Interior, and attorneys for respondents, considered in the light of the actions and charges of the trial judge theretofore occurring and hereinafter stated, convinced petitioners and counsel for petitioners that a plan and agreement existed on the part of all of the said officers to defeat the claims of all parties herein other than the respondents, and that said concerted attacks upon, threats, and charges against these petitioners, petitioners' witnesses, and counsel, by the said trial judge and counsel for respondents, during the said effort to present evidence on behalf of respondents, were made and perpetrated with the objective of embarrassing and obstructing petitioners in the presentation of evidence of the facts as to the heirs of said Jackson Barnett, and to fatally weaken the evidence in support of the cause of petitioners herein.

That so believing, as above stated, and further believing that the said acts, threats, and charges on the part of the said judge during said proceeding were the result of personal bias in the mind of the said judge against petitioners and in favor of the respondents, who were the beneficiaries under said "contract" and "family settlement," and believing that such bias and prejudice against petitioners was so intense as to completely incapacitate the said trial judge to judicially hear and fairly weigh evidence on the part of petitioners,

these petitioners on June 18, 1938, within two days after said above stated information first came to counsel of petitioners, and on the very day said information first came to petitioners, petitioners filed herein their said petition and affidavit to disqualify the trial judge on the ground of personal bias and prejudice. (Vol. 1, pp. 512 to 517, Cl. Tr.)

That as appears in Exhibits 1 to 9, attached to and made a part of said petition and affidavit to disqualify, petitioners attached exact copies of the stenographic record of said proceedings which set forth the exact language the trial judge and counsel for respondents used in said attacks and threats against petitioners' witnesses and counsel, which occurred prior to said June 18, 1938, and copies of the correspondence and statements of fact in reference to the acts and doings of the Assistant United States Attorney, the trial judge, and the officers of the Departments of Justice and the Interior in relation to the execution and approval of said "contract" and "family settlement." (Vol. 1, pp. 518 to 546, Cl. Tr.) That the matters and things stated in said petition and affidavit to disqualify and in said exhibits are not the statements and conclusions of the petitioners, but are statements of the record showing the particular acts, doings and statements of said trial judge, and counsel for respondents.

That thereafter because of subsequent acts and doings on the part of the said judge and counsel for respondents, during further proceedings, the petitioners amended and enlarged said affidavit to disqualify the said judge so as to set forth in substance that in a proceeding had in said court the good character and morality of petitioner, Dora Brady, al-

though not at issue and not material, was attacked by the trial judge and counsel for respondents. (Pp. 8634-8636, 8651-8654, Vol. 18, Rep. Tr.); that said trial judge wrote a letter, during said proceeding, to J. C. Stone, of counsel for respondents, in which said Stone was requested to make an investigation and report to said judge certain supposedly improper conduct on the part of L. J. Burt and Charles E. McPherren, of counsel for petitioners. (Pp. 1338-1340, Vol. 2, Cl. Tr.). That for a full presentation of the nature and purpose of this letter, see pages 104-106, brief of appellants, Dora Brady *et al.*, No. 2176, in Circuit Court of Appeals and to which counsel for respondents have made no answer or explanation.

That, upon the filing of said petition and affidavits to disqualify, the trial judge directed counsel for respondents to file a motion to strike same (Pp. 1070-1071, Vol. 2, Cl. Tr.); then admitted the whole record in evidence to be considered in passing upon said petition and affidavits to disqualify (p. 1073 same); said counsel then filed a response to said application and affidavit to disqualify, and thereafter said judge overruled said petition and affidavits of petitioners to disqualify on the grounds, among others, that same were not filed in due time; that same were not in due form; *that although same alleged that petitioners did not have knowledge of the facts alleged until about the time of filing same, that the court finds said statement to be untrue, and that the grounds alleged for disqualification were without foundation in truth and in fact.* (Pp. 1185-1189, Vol. 2, Cl. Tr.)

That as appears from the faces of said petition and supporting affidavits to disqualify said judge, the same are in due form in all particulars, *and specifically state the numerous acts and doings on the part of the said judge which evidenced the disqualification of said judge to try and determine this action on account of personal bias and prejudice against these petitioners and in favor of the respondents, and as appears from the unchallenged allegations therein same were filed in due time in that same were filed within 2 days after knowledge of the basic facts became known to petitioners and their counsel.* That as will hereinafter appear, the said trial judge erred in all of said findings and conclusions and in permitting the truth of the facts alleged in the said petition and affidavits to be put in issue, erred in admitting the entire record in evidence on the consideration of said petition and affidavits, and erred in making said findings and conclusions that said alleged facts were not true.

FINDINGS OF FACT AND CONCLUSIONS OF LAW BY THE TRIAL COURT

That said trial court made findings of fact and conclusions of law with reference to the cause of petitioners, Dora Brady *et al.*, in substance:

> "1. That [1] neither Albert Brady, Mary Fisk, his wife, nor Dora Brady ever made any effort to cause him [Jackson Barnett] to have any relief, though now it is attempted to be made to appear that they had an interest * * * it was known by them that Jackson Barnett was in distress as disclosed by Exhibit '1' in evidence [p. 714, Vol. 2, Cl. Tr.]; that [2] I failed to find

from a fair preponderance of the evidence that he [Jackson Barnett] ever lived with William or Billy McCombs, or [3] that just after the close of the Civil War and until about 1875 he lived for a period of time at the home of Joe Colbert; or [4] that later he lived for a period of time at the home of John Leecher on the Arkansas River north of Muskogee, Creek Nation, known as Leecher's Ferry." (Pp. 723-724, Vol. 2, Cl. Tr.)

All four of the above findings are in the face of the unchallenged evidence. As to finding (1) with regard to the failure of the family of the petitioner, Dora Brady, to come to the relief of Jackson Barnett, the father of Albert Brady, when mistreated by the representatives of the Interior Department, as is evidenced by said Brady Exhibit "1", obviously said finding is immaterial and is clearly based on the hostile feeling on the part of the judge; however aside from that fact, the evidence shows that Albert Brady and daughter, Dora Brady, were interested in Jackson Barnett at said time and discussed his relationship to them with their neighbors (pages 4817-4818-4819, 4877 to 4882, Volume 10, Rep. Tr.). The other three above findings, as will hereinafter appear, are in the face of the unchallenged evidence, and the admission of counsel of the respondents in their brief filed herein in the Circuit Court of Appeals.

That as to finding (2) in substance that the Court failed to find said Jackson Barnett ever lived at William or Billy McCombs', the same is in the face of all the pertinent evidence presented on the part of respondents as well as the evidence of petitioners and the other parties. This fact is

aptly illustrated by the evidence of Nancy Posey, a witness of high character, presented by respondents, and who in substance testified: That she knew Thlesothle and the Conner family and Jackson Barnett, the son of Thlesothle; that Jennie Conner was a sister of Thlesothle, and the aunt of Jackson Barnett; that when Thlesothle, the mother of Jackson Barnett, died, that Jackson's Aunt Jennie and her husband, Uncle Jeffry, left him to live at the home of William McCombs, and that she saw him there when he was a boy old enough to run errands. This evidence was cited with approval by counsel for respondents and appears on pages 5336-5346, Vol. 11, R. Tr.

That this finding that said Jackson Barnett did not live at the home of Billy or William McCombs is contrary to the evidence of all the witnesses who testified as to the whereabouts and home of Jackson Barnett after the death of his mother, Thlesothle, and before he lived at the home of Joe or Chowee Colbert, and then at the home of John Leecher, is evidenced by the testimony of the following disinterested witnesses:

John A. Jacobs, V. 6, pp. 2669, 2670, R. Tr.; Rebecca J. Baker, V. 21, pp. 10044-10045, same; Nathan Williams, V. 25, pp. 13218-13219, same; Lucy Scott, V. 25, p. 13247, same; Winnie Hendrix, V. 16, p. 7827, same; Taylor Bear, V. 8, pp. 3850-3851, same; Ernest Gouge, V. 4, p. 1539, same; Ellen Smith, V. 19, p. 9259, same; Charlie Barnett, V. 6, pp. 2725-2726, same; Robert Colbert, V. 17, pp. 8214-8218, same; Tom Moore, V. 11, pp. 5014-5015, same; George Scott, V. 17, pp. 8197-8202, same; Wesley Barnett, V. 11, pp. 5020-5021- to 5126, same; Jim Hutton, V. 11, pp. 5095-5097, same; Thompson Col-

bert, V. 10, pp. 4718-4722-4737, same; Wade Kilcrease, V. 10, pp. 4749-4757-4760, same; Lewis Pittman, V. 10, pp. 4758, same; Nancy Posey, V. 25, pp. 5337-5339-5340-5342-5341, same.

That the above comprises all the evidence on this point, and there is no evidence to support the court's said finding to the contrary.

That above finding (3) that the Court failed to find that said Jackson Barnett lived at the home of Joe Colbert until about 1875 is likewise in the face of all the material evidence of witnesses presented on the part of both the petitioners and the respondents and other claimants. That said witnesses were as follows: Charlie Barnett, V. 6, p. 2734, Rep. Tr.; Jim Hutton, V. 11, p. 5097, same; Thompson Colbert, V. 10, pp. 4717-4718, same; Robert Kelley, V. 10, pp. 4764-4767, same; Lewis Pittman, V. 10, pp. 4950-4956, same; who testified that Jackson Barnett, whose heirs were being herein determined, lived at William McCombs' and Joe Colbert's before he went to live at John Leecher's, and no evidence was presented to the contrary.

That said finding (4) that said Jackson Barnett did not later live at the home of John Leecher's on the Arkansas River north of Muskogee, Creek Nation, known as "Leecher's Ferry" is in the face of the admission of counsel during the trial and in their brief filed herein in the Circuit Court of Appeals and is in the face of all the pertinent evidence on the point. That on page 109, Vol. 2, of said answer brief of respondents herein, filed in the Circuit Court of Appeals, it is stated:

"That Jackson Barnett referred to in the above testimony, who stayed at Old Man Leecher's, and who was not married, was the Jackson Barnett whose estate is here involved."

That Jackson Barnett himself testified in a proceeding in the County Court of Okmulgee County, Oklahoma, in May, 1912, some 22 years prior to his death in 1934, that *Albert* had brought him to the court to testify about the execution of a lease, and that he had worked on a ferry run by an Indian about thirty or forty years prior to 1912. That this evidence corroborates the evidence of all other witnesses who testified on the point. (Seaborn Fisher's Exhibit "11," pp. 60-65, being transcript of proceeding.)

2. The trial court further found that said Jackson Barnett was not the father of Albert Brady, and that Albert Brady was a member of the Hickory Ground Creek Town, and that the father of Albert Brady was also a member of the Hickory Ground Creek Town and was dead at the time of the enrollment of Albert Brady and Dora Brady on March 6, 1900, and that the said Jackson Barnett whose heirs are being determined died on or about May 29, 1934, and was a member of Tuckabatchee Creek Town.

The above finding in all of its parts is against all of the evidence on the part of all of the parties, save and except an erroneous recital which appears on the Census Card of Albert Brady (Brady Ex. #5) that his father Jackson Barnett died prior to 1900, and was a member of the Hickory Ground Creek Town. That this recital was erroneous, and that the Jackson Barnett, who was the father of Albert

Brady, was living long after 1900, and visited Albert Brady as late as 1917, and that he was a member of Tuckabatchee Creek Town, and that Cinda Colbert, the mother of Albert Brady, was a member of Hickory Ground Creek Town, and according to the Indian custom, Albert Brady took the Town of his mother, is the uncontroverted evidence of all the witnesses. The evidence of the following witnesses, *being all the witnesses who testified with regard to the facts, is against the said findings and establishes that the Jackson Barnett whose heirs are being herein determined was a member of the Tuckabatchee Creek Town, and the father of Albert Brady, and that the mother of Albert Brady was Cinda Colbert, a member of the Hickory Ground Creek Town, and that shortly after the birth of their son, Albert, Jackson and Cinda separated and Jackson then lived at John Leecher's Ferry, and that after 1900, the said Jackson Barnett and Albert Brady visited together and were recognized by their acquaintances as being father and son until about 1917*:

> Thompson Colbert, Vol. 10, pp. 4721-4722-4723, 4728, Rep. Tr.; Wade Kilcrease, pp. 4750, 4757, same; Robert Kelly, pp. 4766-4767-4770, same; Mary Davis, pp. 4792 to 4795, same; Lucille Hiatt, pp. 4814-4819, same; Mrs. Lee Phillips, 4821-4825, same; Susie Lawson, pp. 4838-4840, same; Lon Hall, 4857-4861, same; Hugh Hale, pp. 4847-4900, same; Della Hale, pp. 4904-4909, same; Jacob Canfield, pp. 4915-4921, same.

That the above uncontroverted evidence, which was presented in part by practically all of the claimants herein, clearly establishes the said admittedly controlling fact that the Jackson Barnett, who was the father of Albert

Brady, was the Jackson Barnett whose heirs are being herein determined.

That said finding that the Jackson Barnett, who was the father of Albert Brady, and the grandfather of petitioners, Dora Brady and Lucinda Watashe, was a member of the Hickory Ground Creek Town is erroneous, and that no Jackson Barnett appears on any of said town rolls, and that no Jackson or Jack appears thereon who could have been the father of Albert Brady, is further established by the certificate of the superintendent to the Five Civilized Tribes having custody of the said rolls (Brady Ex. #8), and by the testimony of J. D. Fulton, the clerk of the said superintendent, and in immediate custody of said rolls (pp. 4925, 4964-4965, Vol. 10, Rep. Tr.), and by the evidence of Jesse McDermitt, Town King of Hickory Ground Creek Town. (Pp. 4968 to 4971, Vol. 10, Rep. Tr.)

That the trial court refused to find any facts as to the places of residence and doings and family relations of said Jackson Barnett from the time of his birth until he was 39 years of age and appeared in the Senora, later Bryant, and Siah Barnett neighborhoods, as the said court was requested to find by these petitioners is evidenced in the record. That had the trial court made any findings whatsoever as to the said period of the life of Jackson Barnett and prior to his attaining the age of 39 years, such findings would necessarily identify the said Jackson Barnett, who was the son of Thlesothle, and was left with his aunt and uncle, the Jeffrys, and then lived at McCombs', then at Colbert's, then at Leecher's Ferry, and then in the Senora, later Bryant, and

Siah Barnett neighborhoods, and then in California where he died, as being the father of Albert Brady.

3-5. That the trial court as the third finding states: "I do not find that Cinda Colbert was married to Jackson Barnett, enrolled as Jackson Barnett, Creek Roll No. 4524," and as the fifth finding states: "I do not find that Jackson Barnett, whose Creek Roll number is 4524, and Cinda Sewell, *nee* Colbert, were living together at the home of said Chowee or Joe Colbert, as man and wife, under the then existing custom in the Creek Nation, nor that they held themselves out to be man and wife and were recognized and treated as such by their associates."

That said two findings are both erroneous, as well as immaterial, for the reason that the rule is well settled by the controlling decisions, hereinafter presented, that where the enrollment record of an Indian (census card) states the names of the parents of such enrollee, "it follows from said recital that the presumption is that said stated parents were married, and that their offspring are legitimate."

9. That the trial court as the only material part of finding numbered Nine, states: "I do not find proof as to marriage of any character between the said Albert Brady and Alice Brady." That this finding is erroneous for the reason stated above in that the enrollment record of Lucinda Watashe (Brady's Ex. #10, p. 4997, Rep. Tr.) states that the parents of said petitioner were Albert Brady and Alice Brady, and the presumption is that said parents were married.

11-12. "I find that Jackson Barnett, Creek Roll No. 4524, whose heirship is being determined in this action, never visited the home of said Albert Brady (Barnett) and was never recognized and treated and introduced and acknowledged by him as his son or that said Albert Brady recognized him as his father.

"The court finds that the said Albert Brady (Barnett) never visited the said Jackson Barnett at different places or that he was recognized and treated and introduced by the said Jackson Barnett as his son."

That these findings are in the face of the undisputed evidence of numerous disinterested witnesses whose evidence is listed under finding No. 2 above, and said finding is unsupported by any evidence.

13. "The court finds that the Jackson Barnett who was the father of the said Albert Brady Barnett was dead on March 6, 1900, and that the said Jackson Barnett, Creek Roll No. 4524, whose heirs are being determined in this action, did not die until May 29, 1934."

That this finding No. 13 is a repetition in part of finding No. 2 above and is in the face of the uncontroverted evidence of numerous disinterested witnesses, whose evidence is in substance stated and referred to above under said Finding No. 2, and no evidence was presented to the contrary save and except the erroneous, as well as incompetent, recital on the Census Card of Albert Brady (Brady's Ex. 5) prepared in 1900.

CONCLUSIONS OF LAW ON PART OF TRIAL COURT

"The court concludes that the said Lucinda Watashe and the said Dora Brady are not the next of kin and heirs of the said Jackson Barnett, Creek Roll No. 4524, whose heirs are being determined herein, and are not entitled to participate as heirs to his said estate in any way. (Vol. 2, p. 728, Cl. Tr.).

"I find from all the evidence in this case introduced on the part of all the claimants that Jackson Barnett, Roll No. 4524, from his youth up had been and was an incompetent (Vol. 2, p. 737, Cl. Tr.); that he was weak-minded, and generally known as 'Crazy Jack', and that he never at any time had sufficient mental capacity to enter into a valid marriage contract. * * *" The court then repeats in part a number of the findings of fact above stated.

That the first paragraph above is an erroneous conclusion that necessarily follows from the above erroneous findings of fact. *That the second paragraph does not constitute a conclusion of law, but is an erroneous finding of fact, and which finding is immaterial, under the admitted record facts, in determining as to whether or not the petitioners, Dora Brady and Lucinda Watashe, are the granddaughters of said Jackson Barnett, and heirs to his estate, as will be presented in supporting brief. That the trial court intended this finding as a conclusion of law is evident, and that the trial court concluded that the cohabitation between said Jackson Barnett and Cinda Colbert, the parents of Albert Brady, was meretricious, and Albert Brady illegitimate, as otherwise the said*

finding or conclusion served no useful purpose. That aside from the fact that the said finding or conclusion is in the face of the evidence as to the mental condition of Jackson Barnett during the period from 1872 to 1875 when said son, Albert Brady, was born (see p. 14 above), the validity of the marriage of Jackson Barnett and Cinda Colbert cannot be successfully attacked in this action, since the well-settled rule is that such marriage would not be void on account of such feeblemindedness or mental incompetency and would only be voidable, and that where same was not attacked during the lifetime of the parents, same could not thereafter be attacked in any proceeding so as to deprive the children of such relationship from inheriting the estate of the father.

JUDGMENT OF THE TRIAL COURT

That although the trial judge was disqualified, as hereinabove stated, the trial court on the basis of the above-stated erroneous and unsupported findings and conclusions made and entered a judgment adjudging the respondents to be the heirs to the estate of said Jackson Barnett and entitled to take same by inheritance and ordered distribution thereof to said respondents.

APPEAL TO AND JUDGMENT OF THE CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

That petitioners duly appealed from said judgment of said United States District Court to the Circuit Court of Appeals, Tenth Circuit, and presented EIGHT POINTS for the consideration and determination of said Court.

That on September 2, 1941, an opinion prepared by Circuit Judge BRATTON was filed and a judgment entered in *Scott* v. *Beams et al.* and four other cases, numbered 2174-2178, reported in 122 Fed. Rep. (2d) 776. That in the said opinion the separate and distinct appeal of petitioners, No. 2176, is only referred to incidentally and several of the controlling points presented therein by petitioners, being distinct and separate from the points presented in said other appeals, were not referred to, discussed, or decided, as will be fully presented in supporting brief hereto. That said oversight and failure to consider and determine the controlling points presented in petitioners' said appeal was presented to the Circuit Court of Appeals in a petition for rehearing, filed on October 2, 1941, and which was overruled on October 10, 1941.

BASIS OF JURISDICTION OF SUPREME COURT TO REVIEW JUDGMENT

That the jurisdiction of the Court is invoked under the provisions of Section 240 of the Judicial Code, as amended, 28 U. S. C. A., Section 347, regulating the issuance of writs of certiorari to review judgments of the Circuit Court of

Appeals, and Sections 249 and 262 of the Judicial Code, 28 U. S. C. A., Section 377 U. S. C. A., providing for the issuance of all writs which may be required for the exercise of the jurisdiction of the Supreme Court, and agreeable to the uses and purposes of law.

QUESTIONS PRESENTED AND REASONS FOR ALLOWANCE OF WRIT

1. Whether, where the Assistant United States Attorney, having interpled on behalf of the United States in this cause to determine the heirs to the said estate of Jackson Barnett, a deceased fullblooded Creek Indian, and acting for the protection of the possession and control of said estate in the Department of the Interior, as well as of the rights therein of such restricted Indian parties, as the Court might adjudge to be said heirs (pp. 81, 82, and 131, 173, Vol. I, Cl. Tr.), it follows that the said Assistant United States Attorney was without legal or moral right or authority to participate in negotiating, executing, presenting, and *securing the approval by the representatives of the Departments of the Interior and Justice, and by the trial judge,* of the so-called "agreement" or "family settlement," entered into on behalf of respondents, as parties to said action, with the purpose and intent of aiding in obtaining in said action a judicial adjudication that said respondents were the heirs to the said restricted estate to the exclusion of these petitioners, Dora Brady and Lucinda Watashe, who are restricted Creek Indians. (Pp. 67-69, Appellants' Brf., Vol. I, Appendix hereto.)

2. Whether the said Assistant United States Attorney, purporting to represent the United States as interpleader on behalf of all restricted Indian parties, including petitioners, had the right or authority, in the execution of the said "agreement" or "family settlement," to secretly represent respondents and thereafter in the trial of this cause to abandon the representation of all such restricted parties, and to represent the respondents as against said restricted parties, and confer with and prepare, and present to the said trial judge for approval, and secure the approval of findings of fact and conclusions of law in favor of the said respondents and against these petitioners in consummation of said "agreement" or "family settlement." (Pp. 652, V. I, Cl. Tr., pp. 79-82 Appellants' Brf., pp. 26-28 Appellants' Answer and Reply Brf., and pp. 2-4 Petition for Rehearing all in Vol. I of Appendix hereto.)

3. Whether the trial judge, after participating in said negotiations preceding the execution and approval of said "agreement" or "family settlement," which had the admitted purpose and intent of aiding the said respondents against these petitioners in establishing their claim to said heirship, and in thereafter permitting the said Assistant United States Attorney to so appear and represent the said respondents in the trial of the said action against these petitioners, and to confer with the said judge in behalf of said respondents, and to present and secure the approval of said requested findings of fact and conclusions of law in behalf of respondents, gravely erred, and on that account was thereafter disqualified to try and determine the issues here-

in as to said heirship. (Pp. 481-492, 512-546, Vol. I, and pp. 748-750, V. II, Clk's Tr. and pp. 68-75 Appellant's Brf., Vol. I, Appendix hereto.)

4. Whether the unquestioned repeated hostile and oppressive acts, statements, threats, and charges on the part of the trial judge against these petitioners, their counsel and witnesses, during the hearing herein, together with the said participation of the said trial judge in the negotiation and approval of said "agreement" or "family settlement," and on account of which conduct counsel for these appellants were finally compelled to refrain from further effort to present evidence on behalf of petitioners, all of which are set forth verbatim in the said petition and affidavit to disqualify said trial judge, were such as to establish the fact that the said judge was personally biased and prejudiced against these petitioners and in favor of the respondents, and divested this proceeding of all the principal characteristics of a judicial hearing, and on that account this proceeding fails to reflect that calm and deliberate consideration of the evidence and judicial impartiality which are consonant with the principles of justice and of due process of law. (Same as above and pp. 4996-5000, V. 10, and 5001-5008, V. 11, Rep. Tr. p. 47, Appellants' Brf., and pp. 42-48, Petition for Rehearing, V. I, Appendix hereto.)

5. That the detailed allegations of specific facts, and the stenographic record of said facts, which are fully set forth in the said petition and affidavit of petitioners herein to disqualify said trial judge, clearly bring the filing thereof within the statutory exception that same be filed prior to

the beginning of the trial, and show that same were filed within three days after the said acts of collaboration on the part of the trial judge and the Assistant United States Attorney in and about the execution, approval, and carrying out of, the said "agreement" or "family settlement," which preceded said trial, first became known to petitioners or their counsel, is the holding in the opinions in controlling federal cases. (Pp. 515-548, V. I, Cl. Tr., pp. 110-117, Appellants' Brf., pp. 29-30, Answer and Reply Brf., V. I, Appendix hereto.)

6. Whether, where it clearly appears from the record that said trial judge required the respondents to put in issue the truth of the record facts alleged and set forth in said petition and affidavit of petitioners as disqualifying said trial judge to try this action on account of personal bias and prejudice against petitioners and in favor of the respondents, and where it further appears from the record that upon the hearing of said petition and affidavit on its merits, the record shows that the trial court admitted and considered voluminous evidence, both documentary and oral, in considering and determining as to the truth of said allegations, and as to the existence of said alleged personal bias and prejudice in the mind of the trial judge, it follows that the said trial court in so proceeding committed error, and that the said trial court exceeded its jurisdiction, *in finding and concluding that the matters and things alleged and set forth in the said petition and affidavit were without foundation in truth and in fact, and that the said petition and affidavit were not filed in good faith, and on that account over-*

ruling same. (Pp. 18-22, Petition herein, *supra;* pp. 1070-1071, V. I, Cl. Tr., and 1185-1189, V. II, Cl. Tr., pp. 109-115, Appellants' Brf., pp. 2-4, Petition for Rehearing, V. I, Appendix hereto.)

7. That the Circuit Court of Appeals in erroneously finding, concluding, and holding in the opinion and judgment herein that the said affidavit of petitioners, Dora Brady and Lucinda Watashe, to disqualify the trial judge on account of personal bias and prejudice "fell far short of stating facts showing bias and prejudice of the court and therefore failed to comply with the requirements of the statute," in that same stated conclusions and not facts, and that the same was not filed until approximately sixty (60) days "after the bias and prejudice of the trial court became apparent," overlooked, among others, the facts, which were specifically set forth in said affidavit in the language of the record, and which in the main consist of quotations from the stenographic record showing the actual conduct, acts, statements, insinuations, charges and threats on the part of the trial judge against petitioners, petitioners' counsel, and witnesses during the attempted presentation of evidence on the part of petitioners, and which record abundantly sustains said application and affidavit to disqualify; that in finding that said petition and affidavit to disqualify was not filed until approximately sixty (60) days after the bias and prejudice became apparent, the Circuit Court of Appeals overlooked the fact that the admitted participation of the Assistant United States Attorney and the trial judge in the negotiation, approval, and execu-

tion of said "agreement" or "family settlement" did not become known to counsel or these petitioners until June 16, 1938, and did not become known to petitioners until the next day, June 17, 1938, and that the said petition and affidavit to disqualify was filed on the following day, June 18, 1938, all occurring within three (3) days, and was accordingly under the controlling authorities filed in due time; that the Circuit Court of Appeals overlooked the fact that the said trial judge, collaborating with J. C. Stone, Esquire, of Muskogee, Oklahoma, of counsel for respondents, during one of the several long recesses of said purported hearing, while in Durant, Oklahoma, wrote said Stone in Muskogee, Oklahoma, a letter in furtherance of what proved to be an unsuccessful effort to secure evidence on which to base a charge that counsel for these petitioners had been guilty of unprofessional and improper conduct through the representation of parties herein whose interests were in conflict and in that manner embarrass and obstruct petitioners in the further presentation of their claim herein; that the Circuit Court of Appeals overlooked the fact that the complete record of said conduct, acts, statements, threats and charges of the trial judge, together with the correspondence and evidence showing the participation of said Assistant United States Attorney and said trial judge in the negotiation, presentation, approval and carrying out of said "agreement" or "family settlement," and the facts showing that these petitioners and their counsel did not learn said facts until two (2) days before the said petition and affidavit to disqualify was filed, were fully set forth in said petition and affidavit, and that the said affidavit does not contain

statements or conclusions, but does contain specific quotations from the unquestioned record which establish the facts. Said Circuit Court of Appeals further overlooked the fact that said affidavit to disqualify was sufficient in form and substance, and that the said trial judge was disqualified on account of personal bias and prejudice against these petitioners, and in favor of the respondents, to try said cause. (Pp. 512-546, V. I, and pp. 1319-1324 and 1328-1340 and 1352-1380, V. II, Cl. Tr., and 8630-8632, 8648, 8651, 8661-8663, V. 18, Rep. Tr., pp. 92-115, Brf. of Appellants, pp. 26-31, Appellants' Answer and Reply Brf., pp. 4-55, Petition for Rehearing herein, V. I, Appendix hereto.)

8. That the Circuit Court of Appeals erred in overlooking, or in disregarding, and not considering and deciding the question as to whether said trial court exceeded its jurisdiction in permitting the joinder of issue on the part of respondents as to the truth of the facts and records set forth in petition and affidavit of petitioners to disqualify said trial judge on the ground of personal bias and prejudice, and in permitting said respondents to present evidence on said issue, and in considering said evidence and finding and concluding in denying said petition that said allegations of fact were in truth and in fact untrue, and that the said petition and affidavit were not filed in good faith. (Pp. 1187-1188, V. II, Cl. Tr.; 109-121, Appellants' Brf.; and 56-59, Petition for Rehearing; V. I, Appendix hereto.)

9. That the said undisputed conduct, acts, statements, insinuations, threats and charges, on the part of the trial judge against these petitioners, which occurred during the

two-day period in which these petitioners undertook to present evidence, and the said prior collaboration between the said Assistant United States Attorney, the respondents, and the trial judge in and about the execution, approval and carrying out of said "agreement" or "family settlement" in favor of the respondents, which occurred prior to said trial and knowledge of which did not come to petitioners or their counsel until June 16, 1938, only two days before said petition and affidavit to disqualify were filed, are sufficient to establish the following:

First: that the mind of the trial judge was so personally biased and prejudiced against these petitioners as to without doubt exclude the possibility of a fair consideration and weighing of evidence presented on the part of petitioners; second, that the said hearing on that account was not a judicial trial in that same "failed to reflect that calm and deliberate consideration of the evidence, and that judicial impartiality which are consonant with the principles of justice and due process of law"; and third, that the Circuit Court of Appeals erred in according to said proceedings the consideration, weight and effect which are properly accorded to those of a qualified and unprejudiced judge. (Pp. 109-115, Appellants' Brf.; pp. 4-54, Petition for Rehearing, V. I, Appendix hereto.)

10. Whether, where it clearly appears from Creek Census Card No. 1701, Field No. 1705 (Brady Ex. 5 and Fisher's Ex. Nos. 19 and 23), being the enrollment record of said Albert Brady, prepared by the Commission, in enrolling Albert Brady in March, 1900, the father of petitioners Dora

Brady and Lucinda Watashe, that Jackson Barnett was the father of the said Albert Brady, it follows that, under the well-recognized rule announced in controlling federal decisions that recital as to the parentage of the enrollee, which appears on the census card (enrollment record) of said enrollee, prepared by the Commission to the Five Civilized Tribes, is descriptive of said enrollee and *prima facie* proof of such stated parentage, and said recital cannot be overthrown, except by clear, cogent and convincing proof to the contrary, and there being no such proof in the case at bar, the said District and Circuit Court of Appeals herein erred in failing to follow and apply the said rule. (Pp. 156-174, Appellants' Brf., pp. 59-61, Petition for Rehearing, V. I, Appendix hereto.)

11. Whether, in considering the right of Albert Brady to enrollment, as a member of the Creek Tribe of Indians, and determining his identity, information as to whether or not Jackson Barnett, the father of Albert Brady, was living or dead at the time of the listing of Albert Brady, or that the said father was a member of any particular Creek Town, were such as is not required as descriptive matter under the provisions of Section 21, of the Act of Congress of June 28, 1898, and on that account such statements were immaterial, and the further reason that the Creek Town to which Albert Brady belonged was controlled by that of his mother, Sinda, and such incidental statements, in the absence of special legislation, are without effect, and are not admissible in evidence. (Same as above.)

12. Whether, where the census card, or enrollment

record, of Albert Brady (Brady Ex. 5), the father of these petitioners, Dora Brady and Lucinda Watashe, which is in evidence herein, recites that Jackson Barnett and Sinda (Cinda, Lucinda) were the father and mother of said Albert Brady, and the census card, or enrollment record, of Lucinda Watashe, formerly Brady (Brady Ex. 10, p. 4997, V. 9, Rep. Tr.), recites that the parents of Lucinda Watashe were said Albert Brady and Alice Fox, it follows from said recital, under controlling decisions, that the presumption is that the said parents of both said Albert Brady and Lucinda Watashe were married, and that the said Albert Brady and Lucinda Watashe were legitimate, and that the findings and conclusions of the trial judge herein, in substance, *that there was no evidence that said stated parents were married, and that Albert Brady and Lucinda Watashe were illegitimate,* are erroneous, and the Circuit Court of Appeals erred in approving said findings and conclusions. (Same as above.)

13. That, as appears from the opinion in said five appeals, being the separate appeal of these petitioners, and the appeals of four other groups, purporting to have been considered and decided together, the Circuit Court of Appeals erred in overlooking or disregarding and failing to consider or decide the above-stated Points, which were pertinent only to petitioners' case, and wherein controlling questions of law are directly presented, and which are bottomed on facts clearly established by unchallenged evidence, and the Circuit Court of Appeals further erred in according, as the said opinion herein shows, to the proceedings, findings of facts,

conclusions of law, and judgment herein of the said disqualified trial judge, the consideration, weight, and effect which are properly accorded to the proceedings, findings, conclusions and judgment of a qualified and unprejudiced judge (p. 782, lower part, first col., 122 Fed. (2d)), and the said Circuit Court of Appeals further erred in failing to conclude and hold in petitioners' said appeal that the proceedings, findings, conclusions and judgment herein had by said judge subsequent to the filing of the said petition and affidavit to disqualify said judge on account of personal bias and prejudice were all in excess of the jurisdiction of said court, and further erred in failing to set same aside, and considering and determining said appeal without regard to said actions on the part of the said disqualified and prejudiced judge. (Pp. 1020-1076, V. II, Cl. Tr.; pp. 89-91, 110-118, Appellants' Brf.; and pp. 10-11, Answer and Reply Brf.; V. I, Appendix hereto.)

14. That all the evidence (pp. 10-18, supra) on the part of the parties relating to the birth, whereabouts, and family relations of the Jackson Barnett, whose heirs are being determined in this action, without conflict, establishes unquestionably that said Jackson Barnett was born near Buzzard Hill, Creek Nation, in about 1852; that he lived with his mother, Thlesothle, in that vicinity until the beginning of the Civil War; that his mother died during or about the close of said war; that his Aunt Jennie and Uncle Jeffrey, when he was big enough to run errands, left him at the home of Billy (William) McCombs; that when about grown he lived at the home of Judge Colbert, together with several

young Creek Indians, among them Sinda Colbert, the niece of Judge Colbert; that Jackson Barnett and Sinda lived together and Albert (Barnett) Brady, father of petitioners, Dora Brady and Lucinda Watashe, was born to them in about 1874 or 1875; that, when Albert was about one year old Jackson Barnett and Sinda separated; that Jackson went to live and work at Leecher's Ferry, and Sinda, taking Albert, went to live with her brother; that said Jackson Barnett then lived at Leecher's until about 1891 when he was about 39 years old, and began living about in the Senora, later Bryant, Siah Barnett neighborhoods; that later he was kidnapped by Annie Laura Lowe, a white woman, and was taken by her to live in different places in Oklahoma, Kansas and California, until he died in Los Angeles, California, in 1934. That the above conclusively established state of facts determines the admittedly-controlling fact of the identity of the Jackson Barnett, who was the father of Albert Brady, and the grandfather of petitioners, Dora Brady and Lucinda Watashe, as being the Jackson Barnett, whose heirs are being herein determined, and that the trial court erred in refusing to so find and the Circuit Court of Appeals erred in affirming said refusal.

15. That the first finding of purported fact on the part of the trial judge herein is "that neither Albert Brady, Mary Fish, his wife, nor Dora Brady ever made any effort to cause him [Jackson Barnett] to have any relief, although now it is attempted to be made to appear that they had an interest * * * it was known to them that Jackson Barnett was in distress as disclosed by Exhibit 'I' in evidence." (P. 714, V. II, Clk's Tr.) Aside from the bitter nature of this

finding, the said finding is in the face of the unquestioned evidence of a number of witnesses, who were neighbors of Albert Brady, during the period of time referred to, and testified that Albert Brady and Dora Brady, the petitioner, from time to time discussed the situation of said Jackson Barnett, their interest in and relationship to him. (Pp. 4817-4818, 4877 to 4882, V. 10, Rep. Tr., and pp. 11 to 19, **supra.**)

Wherefore, premises considered, the petitioners respectfully pray the Court to grant a writ of certiorari for the review of the judgment and proceedings herein, and that said judgment and proceedings be set aside and vacated, and that petitioners be granted the relief to which petitioners are entitled.

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December, 1941